

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT

Civil Action No.: 07-2632-D

JAMES MONTEIRO

Plaintiff

v.

MASSACHUSETTS CIVIL SERVICE COMMISSION

and the CITY OF BROCKTON

Defendants

Notice sent

7/25/03

FJM

JFO

JDR

(md)

JUL 29 2003

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS**

James Monteiro ("Monteiro") brought this case pursuant to M.G.L. c. 30A, and M.G.L. c. 31 §44. (A.R. 248) seeking judicial review of a decision of the Massachusetts Civil Service Commission (the "Commission") which dismissed his claim because he was not an aggrieved party and, thus, they had no jurisdiction.

For the following reasons, the plaintiff's motion for judgment on the pleadings is **DENIED**, and final judgment shall issue confirming the decision of the Civil Service Commission.

FACTUAL BACKGROUND

The following facts are found in the Administrative Record ("A.R."):

On April 28, 2001, the Human Resources Division (the "HRD") of the Civil Service Commission administered an open competitive Civil Services examination to be a Police Officer in the City of Brockton. Monteiro sat for the exam and did not indicate that he was fluent in any non-English language. Monteiro did, however, mark that he was a minority. Monteiro got a score of 94 on the examination. When the Brockton Police

Department sought to appoint 5 new Portuguese speaking officers, the HRD issued a certification list of eligible officers who could be appointed to the position. List 230102 did not contain Monteiro's name.

Brockton is a consent decree community, which requires the town to make appointments with set guidelines relative to race. Under the consent decree, the HRD must list three non-minority applicants for every minority applicant who is included on a Certification List. This is the procedure that was followed on List 230102. In order to attain the legally required makeup of minority and non-minority candidates, HRD had to include non-minority members on List 230102 with lower test scores than Monteiro. The lowest minority appearing on the list had a score of 97 on the test, higher than Monteiro's 94. AR 157.

Monteiro appealed the fact that his name did not appear on List 230102 and the HRD dismissed his complaint. In April 2003, Monteiro sat for another civil service examination. On this examination, Monteiro indicated fluency in French, Haitian Creole, Portuguese, and Spanish. A Certification List was then requested by the Brockton Police Department for Cape Verdean Creole speaking officers and HRD issued List 240857 which included seven names, five of which indicated that they would accept the appointment. Monteiro was the third candidate on the list who indicated he would accept the appointment. Initially no candidates were selected off of the first list and the City of Brockton asked for, and was supplied, a list with more candidates. A.R. 183. Only one candidate was selected, Alcides C. Fortes, who was the highest scoring person on List 240857 who was willing to accept the appointment. No one else from List 240857 was hired.

DISCUSSION

Judicial review of the Civil Service Commission's final determinations is governed under General Laws chapter 30A, §14. G.L. c. 31 §2(b). When reviewing an agency decision, "the court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, §14(7). This Court may only reverse or modify the Commission's decision "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is unsupported by substantial evidence, or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. Substantial evidence as defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." McCarthy v. Contributory Ret. Appeal Bd., 342 Mass. 45, 47 (1961); Cataldo v. Contributory Ret. Appeal Bd., 343 Mass. 312, 314 (1961); G.L. c. 30A, §1(6).

Relief can be granted by the courts if substantial rights have been prejudiced. Here no relief can be granted because no substantial rights of Montiero were prejudiced. Even if Montiero had properly marked that he was a Portuguese speaker he would not have been included on List 230102. For police department appointments in the City of Brockton, HRD chooses candidates for certification lists on a strict formula whereby three non-minority candidates are included for each minority candidate. There is no discretion in the operation of this formula. The highest scoring candidates who fit into this plan are chosen, with residency only being considered if the candidates have the same score. Residency was not considered in List 230102 or List 240857.

Montiero scored a 94 on the 2001 Civil Service Examination. The lowest scoring minority candidate included on List 230102 was 97. Montiero's score was too low, as a minority candidate, to be included on the list. Further analysis of whether Montiero had actually marked off his language fluency accurately is irrelevant because even if he had, he would not have been included on the list because his score was simply too low to be included on the List 230102.

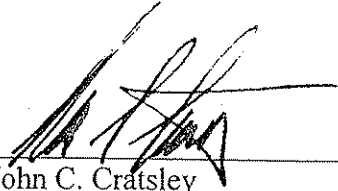
When List 240857 was created, Montiero had corrected any possible miscommunication about his language skills. Only one person on List 240857 was hired, Alcides C. Fortes. Fortes was the top scorer willing to accept the appointment. Fortes had a higher score than Montiero, thus his appointment was not a bypass. A bypass is a situation where one candidate is chosen over another who has the same score, thereby entitling the bypassed person to relief.

M.G.L. c. 31 §2(b) provides that the Commission has subject matter jurisdiction for hearing appeals. The Commission has the authority to "hear appeals by a person aggrieved by any decision, action, or failure to act by an administrator." M.G.L. c. 31 §2(b). A person is considered aggrieved if they make allegations that show that their "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." Id. Here, there is no actual harm to Montiero's employment status. Montiero was not included on List 230102 because he failed to mark that he was fluent in Portuguese, but even if had correctly filled out the form, his score was too low, as a minority candidate, to be included on the list. Montiero was not chosen from List 240857 because someone with a higher score accepted the position. In my opinion, the Commission correctly found that it does not have subject matter jurisdiction

because Montiero's substantial rights were not prejudiced. Therefore, I find that the Commission's decision was supported by substantial evidence.

ORDER

For the foregoing reasons it is **ORDERED** that the petitioner's motion for judgment on the pleadings is **DENIED**. The decision of the Commission is ordered **AFFIRMED**.



John C. Cratsley
Justice of the Superior Court

Dated: July 24, 2008